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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

Edwin F. Gordon, Petitioner
v.
George A. Terry, Sr., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED.

1. May Defendants who are not in strict privity with the Plaintiff, such as participants, aiders and abetters or conspirators in violations of the Federal Securities Acts be held liable therefor.

2. Once an instrument has been determined to be a security, is it a security as to all persons or only as to those persons upon whom the investor relies to manage the investment.

3. Are persons who participate, aid

and abet or conspire in violations of the Federal Securities Acts immune from liability therefor if they are not also persons upon whom the investor is relying to manage the investment.

LIST OF ALL THE PARTIES

This appeal arises from five separate cases in the District Court:

1. Edwin F. Gordon, Petitioner v. E. G. Green, Gustave T. Broberg, Jr., Alice H. Rhoades, George L. Coleman Dudley V. Sutphin, Harold F. Heye, H. Virgil Scherrill, Henry A. Rudkin Samuel R. Sutphin, Pierre T. Heftler William Rudkin, George M. Barley, Jr. First National Bank in Palm Beach, and Heminway Corporation, Respondents.

2. Edwin F. Gordon, Petitioner v. George A. Terry, Sr., Mary E. Terry, George A. Terry, Jr., Netsy B. Terry, E. G. Green, Gustave T. Broberg, Jr., First National Bank in Palm Beach, Hemingway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler, and William Rudkin, Respondents.

3. Edwin F. Gordon, Petitioner v. William Hersey Hamm, III, Edward Hersey Hamm, E. G. Green, Gustave T. Broberg, Jr., First National Bank in Palm Beach, Heminway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler, and William Rudkin, Respondents

4. Edwin F. Gordon, Petitioner v. Estate of M. M. Overstreet, Jeannette Overstreet, Jennings L. Overstreet, Jo Ann Overstreet, E. G. Green, Gustave T. Broberg, Jr., First National Bank in Palm Beach, Hemingway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler, and William Rudkin, Respondents

5. Edwin F. Gordon, Petitioner v. Hobe Properties, Inc., Hobe Jupiter Properties, Inc., Hobe Sound Estates, Inc., E. G. Green, Gustave T. Broberg, Jr., First National Bank in Palm Beach, Heminway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler, and William Rudkin, Respondents

A single order was entered by the District Court granting summary judgment to all defendants on all cases. The Court of Appeals for the Eleventh Circuit consolidated the cases for appeal, reversed as to E. G. Green, a defendant in each case, and affirmed the summary judgment as to all other defendants. Review is sought of that portion of the decision of the Eleventh Circuit Court of Appeals which affirms the summary judgments granted below. Thus, all defendants in the trial court other than E. G. Green are respondents in this Petition.

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I.

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II.

The decision of the court below misapplies the principles

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III.

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Petitioner Edwin F. Gordon respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reproduced as Appendix A hereto. This opinion is, to the knowledge of counsel, not yet reported in the Federal Reporter. The unreported opinion of the United States District Court for the Southern District of Florida in reproduced in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 30, 1982. A timely Motion for Rehearing and Suggestion of En Banc Consideration was filed September 20, 1982. An Order denying rehearing was

entered on October 6, 1982. (A copy of this Order is reproduced as Appendix "C" hereto.) This petition was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUATORY PROVISIONS AND RULES INVOLVED

1. Securities Act of 1933 § 12(1), 15 U.S.C. § 771(1).

2. Securities Act of 1933 § 17a, 15 U.S.C. § 77q(a).

3. Securities Exchange Act of 1934 § 10, 15 U.S.C. 78j.

4. Rule 10b-5 of the United States Securities and Exchange Commission:

The statutes and rule cited above are set out in their entirety in Appendix H-K.

STATEMENT OF THE CASE

The facts of the case as found by the court below, though not as complete as they might be, should be sufficient for the purposes of this Petition.

1. The court below found the following facts relative to Defendant Green were set forth in the uncontraverted affidavits of the Plaintiff:

> Green: Green, a central Florida real estate broker, promoted the land investment syndications. Gordon claims that he relied upon Green's skills and expertise, and that Green represented that he was an expert in selecting bargain-priced central Florida properties which could be resold to his pool of developers within two years at large profits; that "[t]he investors' property would be used . . . to provide the financial basis for the developer he selected and

> thereby give [the] investors a resale price that involved part of the developer's profits"; that he could make such deals because of his contacts and his unique expertise; and that only he knew how to structure the deals.

Gordon v. Terry, Slip Op. at 2512-13, Appendix A at 28a-29a.

2. In evaluating the facts in the record relating to Green, the court below found:

> Gordon has set forth specific statements made by Green which, if proven, demonstrate that Green represented himself to have unique knowledge regarding the real estate market in central Florida and the contacts and expertise to structure highly profitable deals.

Gordon v. Terry, Slip Op. at 2513-14, Appendix A at 33a.

3. The court below found the following facts relative to Defendants Broberg, First National Bank of Palm Beach (Bank) and Barley were set forth in the uncontroverted Affidavits of the Plaintiff:

> Broberg, the Bank, and Barley: Attorney Broberg drafted the trust agreements and the Bank served as trustee for the four land trusts. Barley was named general partner in the partnership agreement. Gordon claims that Green represented that his team of money managers consisted of Broberg and the Bank; that Broberg and the Bank assured Gordon that Green was brilliant and that Gordon was fortunate to be an investor in the syndications; that Broberg and the Bank "claimed great abilities in managing other people's funds; and that all three defendants represented that they would take care of the "managerial legal, and resale operation.

Gordon v. Terry, Slip Op. at 2513, Appendix A at 29a-30a.

4. In evaluating the facts in the record relative to Broberg, the Bank and Barley, the court below found:

> Gordon's assertions demonstrate that the Bank and Broberg had

> confidence in Green's expertise, that they assured Gordon his investments were in good hands, and that they claimed to be skilled in their respective occupations. Last, we are told that all three defendants agreed to manage the syndications.

Gordon v. Terry, Slip Op. at 2514, Appendix A at 34a-35a.

5. Defendant Heminway Corporation is shown by Gordon's affidavits to be the creature corporation through which Green, Broberg and the Bank effectuated their real estate transactions. As to the other defendants in the various actions, it can be only pointed out that Gordon was forbidden to have face to face contact with them. . It also needs to be pointed out that, throughout these proceedings, Gordon has been effectively denied the right to conduct any discovery. Because of these

circumstances, it has not been possible to develop the record with any specificity concerning the other defendants. Under such circumstances, the record could not contain specific facts as desired by the court below, to support the assertions in Gordon's Affidavits that these other defendants "conspired" with the principal defendants and were in a controlled relationship with them. Gordon v. Terry, Slip Op. at 2514, Appendix A at 36a.

6. Federal jurisdiction in this case is founded upon Securities Act of 1933, § 22, 15 U.S.C. § 77v, Securities and Exchange Act of 1934, § 27, 15 U.S.C. 78aa and the principles of pendant jurisdiction.

REASONS FOR GRANTING REVIEW

INTRODUCTION

The opinion below held that there are facts in the record which, if proved, would establish that the investment made by Petitioner Edwin F. Gordon (hereinafter "Gordon") was a security. This holding was based upon the rationale set forth by this court in SEC v. W. J. Howey, Co., 328 U.S. 243 (1946), as adapted to the real estate syndication context by the decision of the Fifth Circuit in Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 396, 70 L.Ed.2d. 212 (1981). This holding was premised upon the court's finding that Gordon in his affidavits established that he relied upon the

expertise and efforts of defendant E. G. Green (hereinafter "Green") to realize a profit upon his investment.

Having determined that Gordon's investment could be proven to be a security, the court then examined the extent and nature of Gordon's reliance upon the other defendants. Though finding that Gordon did rely to a significant extent upon Broberg, Barley and the First National Bank in Palm Beach (hereinafter the "Bank"), the court below found that those three defendants never held themselves out as having unique capabilities. The court then proceeded to hold in a legal non sequitur that Broberg, Barley and the Bank could not be liable to Gordon for their activities.

Petitioner would urge that such a decision is completely without precedence in the annals of securities jurisprudence and contrary to previous decisions of this Court and of all other courts of appeal which have addressed the issue. It is also submitted that such a rationale is inconsistent with the statutory language and congressional intent embodied in the Federal Securities Acts.[1]

[1] The Complaint premised the liabilities of Defendants upon violations of the Securities Act of 1933, 15 U.S.C. 77a. et seq, and in particular §12(1) and §17(a) thereof, 15 U.S.C. 771(1) and 77q(a); Securities and Exchange Act of 1934, §10(b), 15 U.S.C. 78j(b); and Rule 10b-5 promulgated pursuant thereto by the United States Securities & Exchange Commission. These statutes will sometimes hereinafter be collectively referred to as the "Federal Securities Acts".

I.

BY HOLDING THAT THERE CAN BE NO LIABILITY FOR PARTICIPATING, AIDING AND ABETTING OR CONSPIRING IN VIOLATIONS OF THE FEDERAL SECURITIES ACTS, THE ELEVENTH CIRCUIT PLACED ITSELF IN CONFLICT WITH PRIOR AUTHORITY OF THIS COURT AND WITH DECISIONS IN OTHER CIRCUITS.

The issue to be addressed in this Part I. is the liability of collateral participants in violations of the Federal Securities Laws. The primary development in this area has been in cases brought pursuant to Securities And Exchange Commission Rule 10b-5. The rationale of those cases would, however, be equally applicable to a case brought pursuant to § 12(1) or § 17(a) of the Securities Act of 1933. See Lawler v. Gilliam, 569 F.2d 1283 (4th Cir. 1978) (Imposing § 12(1) liability on collateral participants); Fund of Funds v. Arthur Anderson & Co., CCH Fed. Sec. L. Rptr. (Current) ¶98,751(S.D.N.Y.

1982) (Imposing liability under § 17(a)).[2]

There are essentially three bases for finding Rule 10b-5 liability for collateral participants. They may be found to have directly violated the rule, to have aided and abetted another to violate the rule or to have conspired to violate the rule.

[2] For a recent case compiling and analyzing the weight of authority that there exists an implied private right of action under §17(a), See State v. Crofters, CCH Fed.Sec.L.Rptr. (Current) ¶98,632 (Ohio). Whether there is, in fact, an implied right of action under §17(a) is not a decision which must be made at this point in this litigation. The authority relative to Rule 10b-5 which has long been acknowledged to provide a private right of action is sufficient to require reversal of the decision of the court below.

DIRECT VIOLATIONS.

One of the major commentators on Rule 10b-5 summarizes the state of the law relating to collateral participants who directly violate the law as follows:

> If "Z" fraududently induces "X" to trade with "Y", "X" has long been able to sue "Z" at common law. The result is the same for Rule 10b-5 with its broader concept of fraud. Bromberg and Lowenfelds, Securities Fraud and Commodities Fraud, § 8.5 (521) Page 208.8.
>
> "Third persons, though not themselves buyers or sellers, may be within [the Rule 10b-5] sweeping language "any person directly or indirectly...in connection with the purchase and sale of any security." Thus, they are proper parties and may be held liable if they actively participate in the violation." Id. at § 4.5 Page 79.

The "in connection with" element of a 10b-5 violation is established

whenever there is a nexus between a defendant's activities in violation of the Rule and plaintiff's purchase or sale of securities. The plaintiff need not establish a direct relationship, but only that the plaintiff's securities transactions "touch" the Defendant's fraudulent activites . Alley v. Miramon, 614 F.2d 1372 (5th Cir. 1980) (Citing Superintendent of Insurance v. Bankers Life and Casualty Company, 404 U.S. 6 (1971)), Accord, Herzfeld v. Laventhol, Krenkstin, Horwath and Horwath, 540 F.2d 27 (2d Cir. 1976) (Even if a collateral defendant's activities were not the primary or first inducement to plaintiff to enter into the securities transaction, the defendants can still be liable if their

activities were a significant contributing factor); Caroll v. First National Bank of Lincolnwood, 413 F.2d 353(7th Cir. 1969), cert. denied, 346 U.S. 1003(1969)

(Frauds in connection with sales of securities are sufficient to invoke the jurisdiction of Rule 10b-5 although the [defendant] Bank may have neither bought nor sold securities for its own account.)

AIDING AND ABETTING.

A finding that a defendant is guilty of aiding and abetting a violation of Rule 10b-5 is also a sufficient basis for imposition of liability. Zabibriski v. Lewis, 507 F.2d 546(10th Cir. 1974).

A party is liable as an aider and abetter, even if not a primary participant in the fraud, if the following prerequisites to aiding and abetting liability are present:

> (1) The existence of a Securities Law violation by the primary (as opposed to the aiding and abetting) parties;
>
> (2) "Knowledge" of this violation on the part of the aider and abetter; and,
>
> (3) "Substantial assistance" by the aider and abetter in achievement of the primary violation," IIT An International Investment Trust v. Cornfeld, 619 F.2d 909, 922(2d Cir. 1980). Accord, Monsen v. Consolidated Dressed Beef Company, Inc., 579 F.2d 93(3rd Cir. 1978); G.A. Thompson Co., Inc. v. Partridge, 636 F.2d 945 (5th Cir. 1981); cf. SEC v. Coffey, 493 F.2d 1304(6th Cir. 1974), cert. denied, 420 U.S. 908(1975) (SEC enforcement action pursuant to Rule 10b-5)

CONSPIRACY.

The third basis upon which a collateral participant can be held liable for a Rule 10b-5 violation is to be found to have conspired to violate the Rule.

> Rule 10b-5 liability may also be premised upon an even more attenuated relationship with the underlying violation where a party participates in a conspiracy to defraud. Like its criminal law counterpart, proof of conspiracy to violate Rule 10b-5 requires a plaintiff to prove both an agreement to do an unlawful act and an overt act in furtherance of the conspiracy. Bromberg, Securities Law §8.5 (540); Ferguson v. Umnimedia, Inc., 469 F.2d 194(1st Cir. 1972)* Eppricht v. Delaware Valley Machinery, Inc., 407 F.Supp. 315, 320(1976); Accord, Schaeffer v. First National Bank of Lincolnwood, 326 F.2d 1186 (N.D.Il. 1970) (Noting that there is no requirement for privity in a 10b-5 action); cf.

Zabriskie v. Lewis, 507 F.2d 546 (10th Cir. 1974); (Holding both conspiracy and aiding and abetting liability is appropriate); Texas Continental Life Insurance Co. v. Dunne, 307 F.2d 242(6th Cir. 1962) (Not necessary to have privity between plaintiff and defendant to have liability for a conspiracy to violate securities laws).

CONCLUSION.

It can thus be seen that collateral liability for participating, aiding and abetting and conspiring in a primary party's violations of the Federal Securities Laws in general, and Rule 10b-5 in particular, is a well established legal principle. The decision of the court below of completely ignored this established body of law. The court instead goes forward on a theory that only a direct Seller

who claims unique management ability can be liable for securities laws violations.

II.

THE DECISION OF THE COURT BELOW MISAPPLIES THE PRINCIPLES PROPOUNDED BY THIS COURT IN SEC V. W. J. HOWEY, 328 U.S. 293(1946) TO ABSOLVE FROM LIABILITY DEFENDANTS WHO WERE ACTIVE PARTICIPANTS, AIDERS AND ABETTERS AND CONSPRIATORS IN SECURITIES LAW VIOLATIONS UNLESS THE INVESTOR ALSO RELIED UPON SOME UNIQUE MANAGEMENT ABILITY OF THOSE DEFENDANTS.

Since the instruments in which Gordon invested are not expressly denominated in the definitional sections of the Federal Securities Acts, it was necessary for the court below to determine whether or not they fell under the more general description of "investment contract". In so doing, the court below correctly applied the principles propounded by this court in SEC v. W. J. Howey, supra, and United

Housing Foundation v. Foreman, supra, as more specifically applied to the real estate syndication context by Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981).

Those principles led the court to find the investment could be a security because "Gordon has set forth specific statements made by Green which, if true, demonstrate that Green represented himself to have unique knowledge regarding the real estate market in central Florida and the contacts and expertise to structure highly profitable deals". Gordon v. Terry, Slip Op. at 2513-14, Appendix A at 33a. The Court then went on to correctly hold that Gordon's reliance on this unique ability, if proven, would be sufficient

under Williamson to establish that his investment was a securities transaction.

The court below then lost its way. Having established that there could be a securities transaction involved, the next step should have been to identify the participants, aiders and abetters and conspirators who could be found liable. This is the analytical method estabilised by the cases cited in Part I above. Instead, the court continued to focus on the question of "unique" management ability, a question which is only relevant to determining whether or not there is a security. The court below erroneously concluded that:

> The alleged statements and acts of [Broberg, Barley and the Bank] simply do not raise an issue of dependency under

> Williamson's narrow exception. Gordon does not contend that the three defendants possessed unique knowledge or skills, nor does he set forth facts from which we could infer such expertise. Summary judgment as to the Bank, Broberg and Barley therefore affirmed.

Gordon v. Terry, Slip Op. at 2514, Appendix A at 35a-36a.

It is not possible to discern any rationale for the determination of the court below that the uniqueness standard would also be applied to determine who was liable for violations of the Federal Securities Act in that transaction. There are two possible rationales, neither of which has any support in existing securities jurisprudence.

First, the court below may have believed that the investment was a security as to Green, but not as to any other person. This is apparently the

case, as the summary judgment which was affirmed was granted on jurisdictional grounds. Alternatively, the Eleventh Circuit may have thought that, when an "investment contract" type security is involved, all persons other than those upon whom the investor is relying to manage the investment are free to defraud the investor in connection with that securities transaction without incurring any liability under the securities laws. Neither such rationale has any basis in the statutory language or in the case law. Both are directly contrary to all previous jurisprudence of this court and all other circuit courts of appeal.

To demonstrate the incorrectness of the holding of the court below it is

necessary to go no farther than the fountainhead case of SEC v. W. J. Howey, Supra. It was in Howey that this court layed down the fundamental principles upon which an investment is to analyzed to determine whether or not it is an "investment contract" and thus a security within the meaning of the Federal Securties Acts.

In describing how an investment contract case should be analyzed, this court held as follows:

> The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an "investment contract" within the meaning of Section 2(1) [of the 1933 Act]. An affirmative answer brings into operation the registration requirements of Section 5(a)

> unless the security is granted an exemption.

Howey, supra at 1102.

Thus, it can be seen that the determination first must be made whether an investment constitutes a security. If it is a security, the operative provisions of the Federal Securities Acts must be examined to determine whether there has been a violation. If there has been a violation, the next question is who is liable therefor.

An analysis of the facts in the Howey case demonstrate that the person upon whom the investor relies for management expertise is not the only defendant who may be liable. W. J. Howey Company was only the owner of the real estate being sold.

> Howey-In-The-Hills Service, Inc. is a service company engaged in cultivating and developing many of these groves, including the harvesting and marketing or crops .... The service contract gives Howey-In-The-Hills Service, Inc. a leasehold interest and full and complete possession of the acreage. For the specified fee plus the cost of labor and materials, [Howey-In-The-Hills Service, Inc.] is given full discretion and authority over the cultivation of the groves and the harvesting and marketing or the crops.

Howey, supra at 296.

Thus, the investors relied upon the management of Howey-In-The-Hills Service, Inc. There was no reliance on W. J. Howey Company for management, and no representation that W. J. Howey Company had any unique capability. Nevertheless, the Securities and

Exchange Commission sought and this Court approved injunctions against all respondents who were involved in promoting and selling the securities.

Several circuits have examined the liability of collateral participants relative to illegal sales of investment contract securities. In all other circuits, the cases have unanimously followed the framework discussed above which was expounded by this Court in Howey.

Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187 (5th Cir. 1970), like Howey and the instant case, involved the sale of real estate encumbered by management arrangements pursuant to which the purchaser and investor relied upon the promoter or its

affiliates to realize a profit. In Cameron, "Outdoor Resorts was functionally responsible for the rental income through that company's promotion and management." Cameron, supra at 193.

Suit was filed and judgment was entered, however, not only as to Outdoor Resorts but also against "several of its officers and agents". Cameron, supra at 190. Two of the defendants found liable (Cook and Carver) were persons whose role was salesman. See Cameron at 191. Gaines who was also held liable served a National Sales Manager.

There is no suggestion that Cook, Carver or Gaines had any responsibility for management of the investment or that they were represented to have any unique capabilities. However, they did

participate in or aid and abet the securities sales. After finding that the instruments were in fact securities, the Cameron court correctly understood that they were securities as to all of the world and then set about determining which of the defendants actions with respect to the plaintiff made them liable under the applicable substantive provisions of the securities laws.

This proper analytical approach is further exemplified, on facts which have particular relevance to the cases sub judice, in Miller v. Central Chinchilla Group, 494 F.2d 414 (8th Cir. 1974). In Miller, investors were persuaded to purchase chinchillas under such circumstances that the investors were dependent upon Central Chinchilla Group,

Inc. for returns on their investments.

> In an amendment to the Complaint, the Plaintiff added the Mills County Bank as a defendant. The Plaintiffs asserted that the Bank was acting in concert with the Defendants to defraud them and that it aided and abetted in the violations of the securities laws.

Miller at 414-16.

There was no averment or suggestion that the bank was to be involved in the management of the chinchillas or that the bank had any unique capabilities. It was only alleged that the bank was aiding and abetting the offerors of the securities. This was sufficient to allow the Plaintiffs to prove their facts as to the Bank's involvement.

The Ninth Circuit Court of Appeals followed the same path in the case of Hector v. Wiens, 533 F.2d 429 (9th Cir. 1976). Hector invested with Wiens, a feedlot operator in an arrangement which was found to be a security because of Hector's reliance upon Wien's management of the feedlot operation. The Montana Bank financed the arrangement, but did not participate in any way in the feedlot operation. The Court of Appeals for the Ninth Circuit found , however, that a "common enterprise" existed among the plaintiff, the feedlot and the bank because of plaintiff's allegations that the bank entered into a scheme whereby the feedlot would seek potential customers and refer them to the Bank for recommendation and livestock financing.

If this could be proven, holds the Court of Appeals for the Ninth Circuit, the Bank is liable.

A review of the cases in this court and from other circuits thus demonstrates that the decision below is contrary to all prior securities jurisprudence. Questions of liability of collateral participants in "investment contract" securities transactions should be analyzed using the same principles that are applied to other types of securities.

III.

THE DECISION OF THE ELEVENTH CIRCUIT HEREIN WOULD REMOVE FROM THE JURISDICTION OF THE FEDERAL SECURITIES LAW ALL PERSONS INVOLVED IN THE SALE AND DISTRIBUTION OF "INVESTMENT

CONTRACT" SECURITIES WHO ARE NOT ALSO INVOLVED IN THE MANAGEMENT OF THE ISSUER.

To illustrate the incongruity of the opinion of the court below, one need only consider that real estate syndication limited partnership interests which are registered with the Securities and Exchange Commission or properly exempt from registeration are being sold each day by registered broker/dealers who have no connection whatsoever with the management of the syndication. These limited partnership interests are acknowledged by all concerned to be securities because of the reliance of the investor on the general partner.

Under the logic of the court below, these limited partnership interests would not be securities as to persons

selling them, because there would be no reliance by investors upon the management efforts of the those salespersons. It would be possible for anyone, registered or unregistered, using proper techniques or false representations, to sell such instruments to the public without incurring any liability under the Federal Securities Laws. Surely such was never the intent or meaning of the Federal Securities Laws which, as this court has held, embody:

> a flexible rather than a static principle, one that is capable of adaption to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

Howey, supra at 299.

CONCLUSIONS

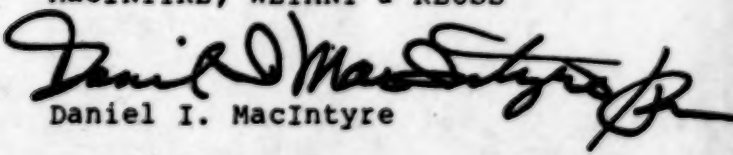
Facts found to be of record by the court below would clearly authorize a

finding that collateral liability as participants, aiders and abetters or conspirators should be imposed upon numerous defendants. Nevertheless, the court below affirmed a summary judgment holding that no collateral liability exists. In so doing, the Court of Appeals for the Eleventh Circuit set itself in conflict with prior decisions of this court and of other circuits.

A Writ of Certiorari should therefore issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MacINTYRE, WEYANT & REUSS



Daniel I. MacIntyre